

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:  
  
BMS SETTLEMENT

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**CLASS COUNSEL’S SUBMISSION OF ADDITIONAL INFORMATION  
RELATING TO THE BMS SETTLEMENT**

At the final fairness hearing held March 28, 2011, the Court asked Class Counsel to provide the Court with the following additional information: (i) additional record evidence relating to the BMS Subject Drugs administered to Class 1 Representative Agnes Swayze; (ii) additional record evidence relating to the damage calculations underpinning the proposed allocation of the \$19 million settlement fund across the Classes; and (iii) a “rebalancing” scenario that provides Class 1 members taking the “Heartland Drugs” with double or treble their actual damages, with a modest recovery for other BMS Subject Drugs.

Class Counsel respectfully file this submission, which contains the information that the Court requested relating to Agnes Swayze and Plaintiffs’ damages estimates. We are not, however, prepared at this time to submit a rebalancing scenario. The Court implored the parties to try and obtain an accommodation that resolves the Aaronson objection. We are working very hard to do that, have enlisted the mediation services of Professor Eric Green, and are including Don Haviland in the process. But more time is needed for this process to unfold. To that end, Class Counsel respectfully request two more weeks until April 22 to respond with a reallocation proposal.

**A. Agnes Swayze Received Administrations Of The BMS Drugs Taxol And Paraplatin During the Class Period And Has Been An Active And Adequate Class Representative**

It is clear that Ms. Swayze was administered a BMS Subject Drug during the class period and that, moreover, one of the drugs administered, Taxol, is a so-called “Heartland Drug” for which the Court found liability during the Massachusetts Class 2/3 trial against BMS.

Ms. Swayze suffers from ovarian cancer and was extensively treated for this cancer in 1994 and again in late 2002 and early 2003. Affidavit of Agnes Swayze (“Swayze Aff.”), ¶ 4. As part of her treatment, Ms. Swayze received injections of the BMS drugs Taxol (BMS’s brand name for paclitaxel, J Code J9265) and Paraplatin (BMS’s brand name for carboplatin, J Code J9045). Her Taxol administrations were on the following dates: December 10, 2002, December 30, 2002, January 20, 2003, February 7, 2003 and March 6, 2003. *Id.*, ¶ 6. Her Paraplatin administrations were on the following dates: December 10, 2002, December 30, 2002, January 20, 2003, February 7, 2003, and March 7, 2003. *Id.*, ¶ 5.

Ms. Swayze received her chemotherapy injections at either her doctor’s office, Valley Tumor Medical Group, or her local hospital, Lancaster Community Hospital. *Id.*, ¶ 7. Billing records from her doctor and the hospital evidencing the foregoing Taxol and Paraplatin injections are attached as Exs. 1-5 of the Swayze Affidavit. *See* Ex. 1 (December 10, 2002 injections); Ex. 2 (December 30, 2002 injections); Ex. 3 (January 20, 2003 injections); Ex. 4 (February 7, 2003 injections); and Ex. 5 (March 6 and 7, 2003 injections).

Exhibit 7 to the Swayze Affidavit is a copy of the claim form that the Settlement Administrator provided Ms. Swayze, showing the eligible BMS drug administrations that appeared in the records provided by CMS. The eligible BMS drug administrations in the CMS records match the administrations and dates identified in the doctor and hospital records found at Exhibits 1 through 5. Swayze Aff., ¶ 9.

As further proof that Ms. Swayze was administered Taxol and Paraplatin, Exhibit 9 contains two pages of her doctor's notes referencing the drugs. More specifically, the February 19, 2003 note states that "Miss Swaze (sic) has ovarian carcinoma and received Paclitaxel and Carboplatin on February 7, 2003," and Dr. Shamasundar's note of December 17, 2002 states "the patient was treated with Taxol and Carboplatinum in the office." Swayze Aff., ¶ 11.<sup>1</sup>

At the time of each Taxol and Paraplatin administration, Ms. Swayze was covered by Medicare, and did not have supplemental, Medi-Gap or other medical insurance. She paid all of her medical bills either by cash, check or credit card and did so for the administrations of BMS's Taxol and Paraplatin. Swayze Aff., ¶ 12; *see also id.*, ¶ 10 & Ex. 8 (attesting to returning her BMS Class 1 claim card to the settlement administrator, which affirmed that Ms. Swayze made, or was obligated to make a co-pay for BMS drugs at issue, and did not have supplemental insurance at the time).

Ms. Swayze stepped forward to be a Class 1 representative in June, 2007, shortly before trial and was formally appointed by the Court as a class representative on August 31, 2007. *Id.*, ¶ 2. Since then, she has been very active participant in this litigation, regularly communicating with Class Counsel (including an in-person meeting in California in June 2007) about the litigation and settlement negotiations. *Id.*, ¶¶ 13-14.

There can be no doubt that Ms. Swayze is an adequate Class 1 representative.

## **B. BMS Damage Calculations**

Plaintiffs' expert, Dr. Raymond Hartman calculated damages for each of the BMS Classes and, within Class 3, calculated damages for TPPs and consumers separately. Declaration

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<sup>1</sup> Although these notes reference "Carboplatinum," the generic name for Paraplatin, Paraplatin was a single-source drug throughout the class period. *In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 106 (D. Mass. 2007).

of Raymond S. Hartman In Support of Bristol-Myers Squibb Settlement Allocation (“Hartman Decl.”), ¶ 1 & Tables 1-5. The methodology used to generate these numbers was based on the same methodology used to calculate damages for trial and assumes a 30% threshold for damages and liability. *Id.*, ¶¶ 2-3.

Tables 1-4 were provided to, and relied on by, Allocation Counsel. *See* Dkt. No. 7458, ¶ 8 & Ex. A. Table 1 summarizes damages across all Classes for the BMS drugs for which the Court found liability in the Massachusetts Class 2/3 trial. Two scenarios are presented. Scenario 1, which totals \$30,763,654, reflects damages to Class members in all 50 states and the District of Columbia. Scenario 2, which totals \$10,479,670, reflects damages to Class members only in the states covered by the Court’s litigation certification and only for the damage periods listed in Table 4. Hartman Decl., ¶ 3.

Table 2 shows the national damages by drug and year for Scenario 1, broken out by Class 1, 2 and 3. Table 3 shows Scenario 2 damages by drug and year, also broken out by Class. *Id.*, ¶ 4.

Table 5 calculates average overcharge percentages by drug and by year for Class 1. Part A of the table shows estimated payments made by Class 1 consumers for those drugs and years where the Court found liability. Part B of this table shows the total damages for all Class 1 consumers by year and by drug. And Part C shows the average overcharge ratio for each drug and year (which is simply Part B divided by Part A). *Id.*, ¶ 7.

DATED: April 8, 2011

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**CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE**

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on April 8, 2011, I caused copies of **CLASS COUNSEL'S SUBMISSION OF ADDITIONAL INFORMATION RELATING TO THE BMS SETTLEMENT** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman  
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